

REMARKS

In view of the comments below, Applicant respectfully requests that the Examiner reconsider the present application including rejected claims 1, 2, 6, 10, and 14-16 and objected to claims 3-5, 7-9, and 11-13, and withdraw the pending objections and rejections.

Statement Concerning Common Ownership of Current Application and United States Patent 7,120,126

The current application and the application that resulted in United States Patent No. 7,120,126 to Odman et al. ("Odman") were, at the time the invention of the current application was made, subject to a duty of assignment to a common entity. In particular, all inventors involved in each of these two cases (Richard D. Roberts, Knut T. Odman, and William M. Shvodian) were under a duty to assign their respective applications to XtremeSpectrum, Inc.

As noted in MPEP § 706.02(1)(2)(II), a statement by an attorney of record to this effect is sufficient evidence to establish common ownership.

Rejections – 35 U.S.C. § 103

The Examiner has rejected claims 1, 2, 6, 10, and 14-16 under 35 U.S.C. § 103(a) as being allegedly unpatentable over United States Patent No. 7,120,126 to Odman et al. ("Odman"). Applicants respectfully traverse this rejection as being an invalid 103-type rejection because both applications were commonly owned.

In particular, Applicant respectfully directs the Examiner's attention to 35 USC §103(c)(1), which states that:

Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

As noted above, Odman and the present application were both subject to an obligation of assignment to the same assignee, XtremeSpectrum, Inc., at the time the present invention was made.

Further, Odman qualifies as prior art only under §102(e). The present application ultimately relies for priority on four separate provisional applications: provisional application serial no. 60/357,638, filed on February 20, 2002; provisional application serial no. 60/397,104, filed on July 22, 2002; provisional application serial no. 60/397,105, filed on July 22, 2002; and provisional application serial no. 60/398,596, filed on July 26, 2002, and has an actual filing date of July 22, 2003.

Odman has a publication date (July 24, 2003) that is after any of these filing dates. As a result, for purposes of 35 U.S.C. §102 categorization, the Examiner must rely upon either Odman's actual filing date (January 22, 2003), or the filing date of the provisional application Odman relies upon for priority (January 22, 2002) to the extent that any relevant material is disclosed in this document.

Therefore, as required under MPEP 706.02(1)(3):

- (A) Applicant has provided proper evidence that both the current application and Odman were both subject to an obligation of assignment to XtremeSpectrum, Inc.;

(B) Applicant has shown how Odman only qualifies as prior art under 35 U.S.C. §102(e); and

(C) Applicant notes that Odman was used in a rejection under 35 U.S.C. §103(a).

Therefore, the Examiner's rejection based on Odman is improper and should be withdrawn. Applicant respectfully requests the Examiner to withdraw this rejection.

For at least this reason, Applicant respectfully requests that the Examiner withdraw the rejection of claims 1, 2, 6, 10, and 14-16 under 35 U.S.C. § 103(a) as being allegedly unpatentable over Odman.

Allowable Subject Matter

The Examiner objected to claims 3-5, 7-9, and 11-13 as being dependent upon a rejected based claim, but indicated that they would be allowable if rewritten to overcome the objections set forth in the pending office action, and rewritten in independent form including all of the limitations of the base claim and any intervening claims.

As noted above, Applicant asserts that the rejection of claims 1, 2, 6, 10, and 14-16 was incorrect, and that these claims are also allowable. Applicant therefore further asserts that claims 3-5, 7-9, and 11-13 are not dependent upon properly rejected base claims. As a result, Applicant does not believe that there is any reason to amend claims 3-5, 7-9, and 11-13 into independent form. They should each be allowable as written.

Conclusion

Applicant respectfully submits that, as described above, the cited prior art is not properly applied to claims in the current application.

Appl. No. 10/623,719
Response dated March 13, 2007
In response to Office Action dated December 13, 2006

In view of the foregoing, Applicant submits that this application is in condition for allowance. A timely notice to that effect is respectfully requested. If questions relating to patentability remain, the Examiner is invited to contact the undersigned by telephone.

Although it is not anticipated that any additional fees are due or payable, the Commissioner is hereby authorized to charge any fees that may be required to Deposit Account No. 50-1147.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Brian C. Altmiller", written over a horizontal line.

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